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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-998

WARDEN, State Prison of Southern Michigan at Jackson,
Petitioner,

v

BERNARD STROBLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Warden of the State Prison of Southern Michigan at Jackson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 1, 1978.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App 11a) affirming Strobel's conviction of first degree murder is reported at *People* v *Stroble*, 31 Mich App 94; 187 NW2d 474 (1971), *lv to appeal den without opinion*, 384 Mich 842 (1971). The 1968 opinion of the United States District Court for the Eastern District of Michigan denying a *pro se* petition for writ of habeas corpus for failure to exhaust state remedies is unreported but appears at App 16a, *Stroble* v *People of the State of Michigan*, No. 31870 (E.D. Mich. November 7, 1968). In the instant habeas corpus proceeding Stroble was initially

denied relief, *Stroble* v *Egeler, Warden*, 408 F Supp 630 (E.D. Mich. 1976) (App 17a), remanded 547 F2d 339 (CA 6, 1977) (App 28a), on remand, *Stroble* v *Anderson*, No. 5-71943 (E.D. Mich. May 6, 1977) (App 31a). The opinion of the United States Court of Appeals for the Sixth Circuit reversing the judgment of the District Court and ordering that the writ be granted is not yet reported, *Stroble* v *Anderson, Warden*, ... F2d .... (CA 6, No. 77-1489, November 1, 1978) (App 38a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 1, 1978, and this petition for certiorari was filed within 90 days of that date. Pursuant to a timely motion filed in the Court of Appeals, an order staying the mandate of the Court of Appeals pending application to this Court for a writ of certiorari was entered on November 20, 1978, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

1. Where a prisoner is rendered under the Interstate Agreement on Detainers to face separate charges requiring separate trials in the receiving jurisdiction, is the prisoner "unable to stand trial" on the second charge, within the meaning of Article VI(a) of the Agreement, during the period from the setting of the trial date until completion of the first trial?

STATUTORY PROVISIONS INVOLVED

The text of the Agreement on Detainers as enacted into law in the State of Michigan, MCLA 780.601-780.608; MSA

4.147(1)-4.147(8), is set forth at App 1a. Selected provisions of particular relevance are set forth below.

> Article IV(c): "In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

> Article V(c): "If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

> Article VI(a): "In determining the duration and expiration date of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter."

> MCLA 780.131; MSA 28.969(1): "Whenever the department of corrections shall receive notice that there is pending in this state any untried warrant, indictment, information or complaint setting forth against any inmate of a penal institution of this state a criminal offense for which a prison sentence might be imposed upon conviction, such inmate shall be brought to trial within 180 days after the department of corrections shall cause to be

delivered to the prosecuting attorney of the county in which such warrant, indictment, information or complaint is pending written notice of the place of imprisonment of such inmate and a request for final disposition of such warrant, indictment, information or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the parole board relating to the prisoner. The written notice and statement provided herein shall be delivered by certified mail."

MCLA 780.132; MSA 28.969(2): "The department of corrections shall notify each prisoner of any request forwarded under the provisions of section 1 of this act."

MCLA 780.133; MSA 28.969(3): "In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

STATEMENT OF THE CASE

This is a habeas corpus case in which the jurisdiction of the District Court was invoked under 28 USC § 2254. Respondent Stroble alleged that his first degree murder conviction in a Michigan court was invalid because although he was made available to Michigan authorities for trial in accordance with Article IV of the Interstate Agreement on Detainers, his trial was not commenced within the 120-day time limit set forth

in the Agreement. Petitioner Warden argued that the trial was timely because valid continuances had been obtained and because the time limitation had been tolled since Stroble was "unable to stand trial" on the murder charge within the meaning of Article VI(a) of the Agreement during the pendency of a prior separate assault trial. The District Court denied relief but the Court of Appeals, whose jurisdiction was based upon 28 USC § 1291, vacated the judgment and remanded the case for entry of the writ of habeas corpus.

In January, 1966, a complaint and warrant were issued in the Detroit, Michigan Recorder's Court charging Stroble with assault with intent to commit murder (File No. A128468) and three days later another complaint and warrant were issued, charging him with first degree murder (File No. A128508) in connection with an unrelated incident. In August, 1966, the Michigan Department of Corrections and the Detroit Police Department were notified that Stroble had been arrested in New York and was being held on the charge of murder. Stroble was convicted of first degree manslaughter in the Bronx Supreme Court on March 15, 1968, and was sentenced to 20 to 30 years imprisonment and incarcerated in the New York State Correctional Facility at Attica.

In May, 1968, the Wayne County Michigan Prosecuting Attorney made a request to New York authorities for temporary custody of Mr. Stroble in accordance with Article IV(a) of the Interstate Agreement on Detainers, in order to bring him to trial on the assault and murder charges. On June 27, 1968, Stroble arrived in Michigan and was arraigned on both charges the next day. Preliminary examinations were scheduled on both charges for July 8, 1968, but were adjourned to July 16, 1968, in order that counsel could be appointed. Following the appointment of defense counsel, preliminary examinations were held on July 16 and 17, 1968, and Stroble was bound over for trial on each charge. On August 15, 1968, a pretrial hearing was held and separate trial dates were set for October 1, 1968,

on the assault charge and October 23, 1968, on the murder charge.

Stroble's assault trial began on October 1, 1968, and concluded on October 8, 1968, when he was found guilty of assault with intent to do great bodily harm. On October 10, 1968, Stroble's murder trial was adjourned until December 2, 1968, in order to obtain a new jury panel. On October 11, 1968, Stroble filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan (Docket No. 31870). On October 26, 1968, defense counsel moved to suppress a confession with respect to the murder charge and scheduled the motion for hearing on November 15, 1968. On November 7, 1968, the *pro se* petition for writ of habeas corpus was dismissed. On November 29, 1968, the motion to suppress the confession was denied in an order made *nunc pro tunc* to November 22, 1968. On December 2, 1968, the murder trial was adjourned to December 16, 1968, because the court had another jury trial in progress.

Stroble's murder trial began on December 16, 1968, 172 days after his arrival in the state of Michigan, and concluded on December 20, 1968, when he was found guilty of first degree murder and sentenced to a term of life imprisonment.

Stroble was returned to New York to complete his sentences there, was subsequently paroled to Michigan, and is currently incarcerated in Michigan solely on the life imprisonment sentence imposed following the murder conviction. In this proceeding it is the contention of Petitioner Warden that Stroble was "unable to stand trial" on the murder charge during the period from the setting of the assault trial date until completion of the assault trial (August 15, 1968 to October 8, 1968).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF LAW UNDER THE INTERSTATE AGREEMENT ON DETAINERS WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE COURT.

The Court of Appeals erroneously concluded that the record does not disclose any determination by the state court that Respondent Stroble was unable to stand trial. Slip opinion pages 15-16, App 55a. Petitioner Warden asserts, however, that the determination of this issue involves a conclusion of law rather then merely a finding of fact and was therefore susceptible to resolution by the District Court. To the extent that such a determination involves a finding of fact Petitioner Warden submits that such a finding was made when, on August 15, 1968, the Recorder's Court for the City of Detroit ("the court having jurisdiction of the matter", Article VI(a)) ordered two separate consecutive trial dates. By ordering consecutive rather than concurrent trials, the Michigan court made a determination that Stroble was unable to stand trial on the second charge until completion of the first trial.

The question involved here—whether the Agreement's tolling provision applies to two separate consecutive trials within the same jurisdiction in the receiving state—appears to be one of first impression. Counsel for Petitioner Warden has been unable to locate any appellate case which has decided this specific issue, although in slightly different factual contexts several courts have held that an accused is unable to stand trial on one charge during the time he is on trial on a different charge. In *United States* v *Mason*, 372 F Supp 651 (ND Ohio, 1973) an Ohio inmate who had requested disposition of a federal detainer pursuant to Article III(a) of the Agreement was transferred to Michigan for a separate trial and sub-

sequently complained that the federal authorities could not bring him to trial because the Agreement's time limits had passed. The court rejected this argument holding that he was unable (per Article VI(a)) to stand trial on the federal charges for the entire period from his transfer to Michigan until his return to Ohio. Although unlike the instant case *Mason* involved two jurisdictions, it is the existence of the separate trials which is determinative, not the physical separation of the trial sites. For similar holdings that the Agreement's time limits are tolled as to one charge during the pendency of a separate trial, see *Price* v *State*, 237 Ga. 352; 227 SE2d 368 (1976) and *State* v *Wood*, 241 NW2d 8 (Iowa, 1976). In *Wood* the court noted that Article VI(a) automatically tolls the running of the time periods and there is no requirement that the prosecution seek a continuance when inability to stand trial is the reason for the delay.

Although the Interstate Agreement on Detainers does not make specific provision for the problems which arise when two separate consecutive trials are required in one jurisdiction, logic and fairness compel the conclusion that the time limits contained in the Agreement are tolled as to the second charge until completion of the first trial. This result is also consistent with the statement in *Beavers* v *Haubert*, 198 US 77, 86 (1905), in the context of the constitutional right to a speedy trial, that when a defendant is charged with more than one offense, "he cannot be tried for all at the same time, and his rights must be considered with regard to impractical administration of justice."

Because this is a case of first impression and because the language of the statute does not conclusively resolve the question, this Court has the opportunity to interpret the scope of Article VI(a) and determine whether it applies to a defendant involved in consecutive unrelated trials in a single jurisdiction. By its terms, the Agreement appears to con-

template a single proceeding in the receiving jurisdiction since Article IV(a) refers to "an untried . . . complaint" and Article IV(c) also uses the singular when it refers to "any proceeding made possible by this Article." Similarly, Article V(c) which specifies the penalties for violation of the time limits refers to "an action on the . . . complaint." The instant case involves different circumstances in that there are two unrelated changes in the receiving jurisdiction as to which the state court determined that consecutive trials were necessary.

Although the Agreement apparently does not contemplate multiple trials within a single receiving jurisdiction within the 120-day time limit, two mechanisms are available for resolving any difficulties: a continuance may be obtained under Article IV(c) or the time periods may be tolled under Article VI(a) "whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." In this case the delay in Stroble's murder trial was not caused by valid continuances under the Agreement but Petitioner asserts that during the 54-day period from the setting of the assault trial date to the completion of the assault trial, Stroble was unable to stand trial on the murder charge and therefore the running of the time limitation was tolled for that period.

In interpreting Article VI(a) this Court must weigh the utility of an inflexible rule requiring dismissal of criminal charges for a nonprejudicial failure to mechanically observe the 120-day time limit against the cost of extending such a rule to collateral review of a state court conviction in which neither the integrity of the fact-finding process nor the fundamental fairness of the trial are impugned. Such an inflexible rule requiring dismissal would be of minimal utility in furthering the Agreement's policy of encouraging orderly and expeditious disposition of untried charges because, as

Petitioner has argued, the Agreement simply did not contemplate the situation of multiple trials within a single jurisdiction.

The societal costs of a rule requiring the same time limit for multiple unrelated charges are significant. Here the Respondent seeks to overturn his first degree murder conviction on an issue which has no bearing on his guilt or innocence, the integrity of his trial or the fairness of his conviction. Since he has not even alleged the existence of bad faith by the prosecution or any prejudice resulting from the short delay of his murder trial, overturning his conviction would result in an undeserved windfall totally disproportionate to any wrong he may have suffered.

Although it appears that the Agreement on Detainers may confer rights upon Respondent Stroble which are enforceable in this habeas corpus proceeding, the Agreement is also a part of the substantive law of the State of Michigan and therefore the interpretation given by the state courts are entitled to consideration, particularly on this question of first impression. In *West Virginia ex rel Dyer* v *Sims*, 341 US 22, 28 (1950) this Court held that it has "final power to pass upon the meaning and validity of compacts" but went on to say:

> "Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged."

Michigan has a statute which is essentially an intrastate version of the Agreement on Detainers. This statute, MCLA 780.131, *et seq*; MSA 28.969(1), *et seq*, requires that an inmate be brought to trial within 180 days after a request for final disposition of untried Michigan charges. Section 3 of the act

provides that if action is not commenced on the matter within the time limitation then the untried charges shall be dismissed with prejudice.

This statute is quite similar to the provisions of the Interstate Agreement on Detainers but the Michigan Supreme Court has held that the 180-day time limitation requires merely good faith action by the prosecutor to bring the case to trial. *People* v *Hendershot*, 357 Mich 300; 98 NW2d 568 (1959). In *People* v *Hill*, 402 Mich 272; 262 NW2d 641 (1978) the Michigan Supreme Court held that charges need not necessarily be dismissed when a second trial was delayed beyond the statutory time limit to allow the trial of another unrelated charge against the defendant. The court noted, 402 Mich at 281-282 that there is no constitutional or statutory impediment inherent in prosecuting unrelated offenses against the same defendant at consecutive trials and further noted that under Michigan law the defendant had a right to separate trials. In *Hill* the court remanded the cause for a determination of whether the prosecutor had established good faith action to bring the matter to trial.

In the instant case the court having jurisdiction of the matter on August 15, 1968, ordered separate consecutive trials. This action was eminently proper under state law and constitutes a determination that Respondent was unable to stand trial on the second charge during the pendency of the first trial. Although the prosecutor could have attempted to obtain a continuance of the murder trial, such action was not necessary because of the automatic tolling provisions of Article VI of the Agreement on Detainers. Respondent Stroble seeks to vitiate his conviction of first degree murder by applying an unnecessarily inflexible and arbitrary interpretation to the provisions of Article VI. Petitioner seeks only to have Article VI interpreted in a manner consistent with analogous provi-

sions of state law and consistent with the Agreement's policy of encouraging expeditious and orderly disposition of untried charges.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated: December 15, 1978

APPENDIX

APPENDIX

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INTERSTATE AGREEMENT ON DETAINERS

Act 141, 1961, p 194; eff September 8.

AN ACT to ratify and enact the agreement on detainers into the laws of the state; to provide for the administration and enforcement of the agreement; and to provide penalties for violation of this act.

The People of the State of Michigan enact:

MCLA 780.601; MSA 4.147(1): Sec. 1. The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

THE AGREEMENT ON DETAINERS

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of co-operative procedures. It is the further purpose of this agreement to provide such co-operative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be

accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, information or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice request, and the certificate. If trial is not had on any indictment, informa-

tion or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: Provided, That the

court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: And provided further, That there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from tempo-

rary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers or other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable, and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

MCLA 780.602; MSA 4.147(2): Sec. 2. The phrase "appropriate court" as used in the agreement on detainers, with reference to the courts of this state, means all courts of record.

MCLA 780.603; MSA 4.147(3): Sec. 3. All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

MCLA 780.604; MSA 4.147(4): Sec. 4. Nothing in this act or in the agreement on detainers shall be construed to require the application of sections 10, 11 and 12 of chapter 9 of Act No. 175 of the Public Acts of 1927, as amended, being sections 769.10, 769.11 and 769.12 of the Compiled Laws of 1948, to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of said agreement.

MCLA 780.605; MSA 4.147(5): Sec. 5. Escape from custody while in any other state pursuant to the agreement on detainers constitutes an offense against the laws of this state to the same extent and degree as escape from prison in this state and shall be punishable in the same manner as such an escape.

MCLA 780.606; MSA 4.147(6): Sec. 6. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

MCLA 780.607; MSA 4.147(7): Sec. 7. The director of the department of corrections shall serve as the central administrator and chief enforcement officer of this act.

MCLA 780.608; MSA 4.147(8): Sec. 8. Copies of this act, upon its approval, shall be transmitted to the governor of each state and the attorney general and the secretary of state of the United States and to the council of state governments.

PEOPLE v. STROBLE

[31 Mich App 95]

Appeal from Recorder's Court of Detroit, Walter P. Cynar, J. Submitted Division 1 November 5, 1970, at Detroit. (Docket No. 7709.) Decided February 23, 1971. Leave to appeal denied May 20, 1971, 384 Mich 842.

Bernard Stroble was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, *William L. Cahalan*, Prosecuting Attorney, *Dominick R. Carnovale*, Chief, Appellate Department, and *Angelo A. Pentolino*, Assistant Prosecuting Attorney, for the people.

Arthur J. Tarnow, State Appellate Defender, for defendant on appeal.

Before: LESINSKI, C. J., and J. H. GILLIS and BEASLEY,[*] JJ.

PER CURIAM. Found guilty of first-degree murder[1] by a jury, defendant appeals, seeking reversal of his conviction.

This case arises from the shooting and killing of James Raffoul, a jewelry store clerk, in Detroit on December 24, 1965,

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[*] Circuit judge, sitting on the Court of Appeals by assignment.

[1] MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

during the course of an armed robbery. During this hold-up the jewelry store owner, Joseph Cooper, was also shot and subsequently died some months later.

[31 Mich App 96]

Defendant was apprehended in New York City in connection with an unrelated offense and confessed the Detroit murder of Raffoul to a New York police detective, who testified he had not previously heard of the Detroit crime to which the defendant confessed. On trial, defendant's confession was admitted in evidence, after a full *Walker* hearing[2] by the trial judge.

It should be noted that the jury verdict did not rest solely upon the confession since the jewelry store owner, also shot in the robbery, positively identified defendant as the killer at the preliminary examination. However, he died of his wounds before trial.

In the *Walker* hearing, defendant asserted that he knew about the *Miranda* case[3] and understood the *Miranda* warnings. Specifically, defendant testified that he knew he had a right to remain silent; the right to refuse to give a statement; that if he did talk to the police what he said could be used against him; that he had a right to have counsel; that if he could not afford counsel, counsel would be furnished him; and that he had a right to have counsel present during the questioning if he chose; and that he had a right to be represented by counsel at trial, arraignment, examination, "etc." (Quoted "etc." is defendant's word. Defendant subsequently claimed that the police did not give him *Miranda* warnings and that he never gave a statement.

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[2]
People v. *Walker* (On Rehearing 1965), 374 Mich 331.

[3]
Miranda v. *Arizona* (1966), 384 US 436 (86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974).

However, in view of the other testimony in this record, it is unnecessary to decided whether there is any legal reason requiring a *Miranda* warning where a defendant freely and voluntarily admits he knows all about his *Miranda* rights. The New York police [31 Mich App 97] detective testified unconditionally that he gave the *Miranda* warnings to defendant. If that testimony is believed, and the record would indicate the trial judge apparently did believe this testimony, there was sufficient basis for the trial judge to admit the confessions after the *Walker* hearing. The issue in the *Walker* hearing was of credibility, and the record was ample to support the trial judge's finding.

Defendant further argues that he was unduly prejudiced by the assistant prosecutor stating in closing argument his personal belief that the New York detective had told the truth. An examination of the closing argument as a whole does not give any indication that the prosecutor intended to apply any special knowledge as to the credibility of the witness. More important, no objections were raised to these remarks at the time they were made, nor was there a request made for an instruction concerning the argument. Failure to make timely objection to the content or form of closing arguments precludes raising the question on review.

Lastly, defendant claims that under the Interstate Agreement on Detainers to which Michigan has become a party to statute (MCLA § 780.601 [Stat Ann 1969 Rev § 4.147(1)]), this conviction for this murder should be reversed and an order entered dismissing these proceedings with prejudice on the ground that he was not brought to trial within the time specified in the statute. The portion of the statute relied upon by defendant provides as follows:

"In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the [31 Mich App 98] court having jurisdiction of the matter may grant any necessary or reasonable continuance."

The facts are that defendant was arrested in New York City in connection with a homicide that occurred there. He was tried, convicted of first-degree manslaughter under New York law, and sentenced to a 20- to 30-year term in prison. As indicated above, defendant confessed both of the Detroit jewelry store murders to the New York police. On June 27, 1968, defendant was brought to Detroit under the Interstate Agreement on Detainers in connection with both crimes. In the other case he was charged with assault with intent to murder (MCLA § 750.83 [Stat Ann 1962 Rev § 28.278]), which, for purposes of this opinion, will be designated the assault case. On June 28, 1968, he was arraigned on both the assault charge and the within murder charge. On the assault charge, preliminary examination was held on July 16, 1968. On the murder charge, preliminary examination commenced on July 16, 1968, and was continued on July 30, 1968. On August 15, 1968, a pretrial hearing was held in this murder case and October 23, 1968, was the date set for trial.

In the meantime, on September 13, 1968, defendant was notified that the assault charge was set for trial on October 1, 1968. On that date, namely 95 days after defendant was brought to Michigan, the assault trial commenced, and on October 8, 1968, defendant was convicted by jury verdict of assault with intent to murder.

The within murder case was set for trial on October 23, 1968, but on October 11, 1968, defendant applied to the Federal district court in Detroit for a writ of *habeas corpus* in connection with the within case. On the trial date, October 23, 1968, the *habeas* [31 Mich App 99] *corpus* in the Federal court was still pending and unresolved.

We find that under the circumstances of this case, the pendency of the *habeas corpus* proceeding in the Federal court operated to stay application of the 120-day period provided in the Interstate Agreement on Detainers.

Eventually, on November 7, 1968, the Federal court dismissed the *habeas corpus* proceeding bought by defendant.

On December 16, 1968, defendant went to trial on this murder charge and on December 20, 1968, the jury rendered a verdict of guilty of first-degree murder against defendant.

The adjournment of trial from October 23, 1968 to December 16, 1968 was for good cause.

Under the circumstances of this case where defendant was in fact brought to trial within 120 days on one of the charges for which he was brought to Michigan, and where defendant by his own act delayed his trial to seek relief from this charge in the Federal court, this Court does not believe defendant is entitled to dismissal of this conviction under the 120-day limitation Interstate Agreement on Detainers.

Affirmed.

All concurred.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BERNARD STROBLE, JR., Petitioner, -vs- THE PEOPLE OF THE STATE OF MICHIGAN, ET AL, Respondents.	Civil Action No. 31870

ORDER

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on Nov. 7, 1968.

PRESENT: HONORABLE TALBOT SMITH
United States District Judge

Petitioner Bernard Stroble is before this Court on a petition for a writ of habeas corpus.

Petitioner is now serving a sentence in the State of New York and is presently under the custody of the State of Michigan by virtue of an indictment charging this defendant with first degree murder, an offense for which he is awaiting sentence.

Petitioner alleges that he is not lawfully in the custody of the State of Michigan. Petitioner admits in his answers to the questionnaire sent him by the Court, that he has not made any attempt to exhaust his state remedies in this regard but that he intends to do so.

Until this is done, Petitioner is not entitled to relief in this Court. Section 2254, Title 28, requires that the petitioner exhaust the remedies open to him in the state of his conviction. Petitioner has clearly not begun this process in Michigan, nor has he completed this process in New York.

The petition is dismissed for failure to exhaust state remedies as required by Section 2254, Title 28, United States Code.

It is so ordered.

Talbot Smith /s/
United States District Judge

A TRUE COPY

FREDERICK W. JOHNSON, Clerk

BY Pauline L. Ogden /s/
Deputy Clerk

[408 F. Supp. 630]

Bernard STROBLE, Petitioner,

v.

Charles E. EGELER, Warden, State Prison for Southern Michigan, Respondent.

Civ. A. No. 5-71943.

United States District Court,
E. D. Michigan, S. D.

Feb. 23, 1976.

[408 F. Supp. 631]

Neal Bush, Detroit, Mich., Haywood Burns, New York City, for petitioner.

A. Michael Leffler, Asst. Atty. Gen., Lansing, Mich., for respondent.

MEMORANDUM OPINION AND ORDER

JOINER, District Judge.

Petitioner Bernard Stroble, presently serving a life sentence for murder at the State Prison of Southern Michigan at Jackson (Jackson), has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising two claims: (1) that Michigan failed to try him on the murder charge within 120 days after he was brought to Michigan from New York for trial contrary to the provisions of the Interstate Agreement on Detainers, M.C.L.A. 780.601 *et seq.*, and that the holding of the Michigan Court of Appeals that petitioner stayed the running of the 120 day period by filing a petition for a writ of habeas corpus in the United States District Court penalizes him for exercising a federal right and violates his rights to due process and equal protection of the laws; and (2) that Michigan waived its right to imprison petitioner on his murder conviction [408 F. Supp. 632] when state authorities returned petitioner to New York after he had begun serving his life sentence at Jackson. The respondent has filed a motion to dismiss or alternative motion for summary judgment pursuant to Fed.R.Civ.P. 12(b)(6) and 56. The record shows the following facts.

In January, 1966, while Stroble was on parole from Jackson,

two warrants, one charging assault with intent to kill and the second charging murder, were issued against him in Detroit Recorder's Court. Stroble was arrested by New York authorities in June, 1966, charged with manslaughter in New York, tried, convicted, and incarcerated at the New York State Correctional Facility at Attica. On June 27, 1968, Michigan authorities brought Stroble back to Michigan for trial on the Michigan warrants pursuant to the temporary custody provisions of the Interstate Agreement on Detainers. He was arraigned on both the assault and murder charges on June 28, 1968.

The preliminary examination on the assault charge was held on July 16, 1968. On the same date the preliminary examination on the murder charge was begun but was continued until July 30, 1968. On October 8, 1968 Stroble was found guilty of assault with intent to do bodily harm less than murder. The murder charge was set for trial on October 23, 1968, 118 days after Stroble's arrival in Michigan. On October 11, Stroble filed a pro se habeas corpus petition in the United States District Court for the Eastern District of Michigan claiming that Michigan authorities had kidnapped him from New York. The district court dismissed the petition on November 8, 1968, for failure to exhaust state remedies (Case No. 31870).

On October 23, 1968, petitioner's trial was continued. The record shows that the trial court decided at least one pre-trial motion subsequent to the October 23rd date, specifically a motion to suppress a confession filed October 26, 1968 and decided November 22, 1968.[1] The trial began on December 16. Stroble was convicted of murder and sentenced to life imprisonment on December 20, 1968. After sentencing on the murder charge but *before* sentencing on the assault charge, state au-

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[1] The record indicates that the prosecution gave the defendant notice of its intention to use a confession on July 22, 1968.

thorities sent Stroble to Jackson with documents indicating that he was a technical parole violator with a new life sentence. On February 5, 1969, he appeared in Recorder's Court for sentencing on his assault conviction, and a few days later Detroit authorities returned him to New York.

Stroble appealed his conviction to the Michigan Court of Appeals on the ground that the trial court lacked jurisdiction to try him for murder because his trial had not begun within 120 days after his arrival in Michigan as provided by the Interstate Agreement on Detainers. The court held (1) that the filing and pendency of Stroble's habeas corpus petition in the United States District Court operated to stay the application of the 120 day period, (2) that there was good cause for the October 23rd adjournment; and (3) that petitioner's rights had not been violated under the Detainer Agreement when he was brought to trial on one charge within 120 days of his arrival in Michigan. *People* v. *Stroble*, 31 Mich. App. 94, 187 N.W.2d 474 (1971). The Michigan Supreme Court subsequently denied leave to appeal.

In March, 1974, petitioner's New York sentence was reduced, making him eligible for parole. New York authorities subsequently notified Michigan authorities that petitioner would be available for parole to his Michigan warrants and also that he faced trial in Buffalo, New York for charges arising out of his alleged participation in the Attica riots.[2] [408 F. Supp. 633] Petitioner was acquitted of several "Attica" charges in 1975. In July, 1975, bail was set for the remaining charges, and petitioner was returned to Michigan and incarcerated at Jackson. This action followed.

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[2] In June, 1974, a Michigan Department of Corrections official wrote New York officials that Michigan did not have jurisdiction over Stroble. However, this error was corrected by letter in September, 1974.

Michigan and New York are both signatories to the Interstate Agreement on Detainers which establishes procedures for member states to effect the disposition of out of state criminal charges pending against persons incarcerated in state institutions. M.C.L.A. 780.601-.608; C.P.L. § 580.20 *et seq.* (McKinney). The purpose of the Agreement is to encourage the expeditious and orderly disposition of untried criminal charges pending against state prisoners in other jurisdictions through the use of cooperative procedures because outstanding criminal charges and difficulties in securing speedy trials on out of state charges produce uncertainties which obstruct prisoner treatment and rehabilitation. Art. I.

Art. IV(c) of the Agreement provides that when a prisoner is sent from one state to another for purposes of trial, he shall be brought to trial within 120 days after his arrival in the receiving state, but the trial court may grant any necessary and reasonable continuance for good cause shown in open court with the prisoner or his counsel present, and this time does not count in determining the 120 day period. When the prisoner is not brought to trial within the 120 day period as extended, the court should enter an order dismissing such charge. Art. V(c). The court may toll the time periods established by the Agreement for as long as the prisoner is unable to stand trial. Art. VI(a).

An out of state prisoner in temporary custody shall be lodged in a jail or a facility regularly used to house individuals in pre-trial custody. He should be returned to the sending state as soon as possible consonant with the purposes of the Agreement. Art. V(d), (e). The prisoner remains in the legal custody of the sending state except for the limited purpose for which temporary custody was awarded, *i. e.* to permit trial on pending charges. Art. V(d), (g). The Agreement also provides

that its provisions shall be construed liberally to effectuate its purposes to encourage the expeditious and orderly disposition of untried criminal charges in foreign jurisdictions. Art IX.

I

Petitioner's first claim is that Michigan's refusal to dismiss the murder charge when his trial did not begin within 120 days from the date he was brought to Michigan denies him a federally protected right, and that the holding of the Michigan Court of Appeals in *People v. Stroble, supra,* that petitioner stayed the running of the 120 day period by filing a habeas corpus petition in the United States District Court penalizes petitioner for filing his habeas corpus petition and violates his rights to due process and equal protection of the law. This court agrees that a prisoner's rights under the Interstate Agreement are federal rights.

The United States Constitution provides that Congress must approve interstate compacts among the states. Art. I, § 10, Cl. 3. Section 112(a), Title 4, U.S.C. gives states advance Congressional approval to set up interstate agreements to improve law enforcement. The construction of interstate compacts, sanctioned by Congress under Article I, Section 10, presents a federal question. *Petty v. Tennessee-Missouri River Commission,* 359 U.S. 275, 279, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959); *Dyer v. Sims,* 341 U.S. 22, 26, 71 S.Ct. 557, 95 L.Ed. 713 (1951); *Delaware River Commission v. Colburn,* 310 U.S. 419, 427, 60 S.Ct. 1039, 84 L.Ed. 1287 (1940). Interstate compacts sanctioned by Congress under the Constitution give rise to federal titles, rights, privileges and immunities. *United States ex rel. Esola v. Groomes,* 520 F.2d 830, 841 (3rd Cir. 1975) (Garth, J., concurring); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517, 521 (9th Cir.), *cert. denied,* 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654

[408 F. Supp. 634]

(1975). Thus, a state prisoner who alleges that he has been denied rights under the Interstate Agreement on Detainers meets the requirements of 28 U.S.C. § 2254 which provides for habeas corpus jurisdiction for a state prisoner only when he alleges that he is in custody in violation of the Constitution or the laws of the United States upon exhaustion of state remedies. *Wingo v. Ciccone,* 507 F.2d 354, 357, n. 11 (8th Cir. 1974); *Grant v. Hogan,* 505 F.2d 1220, 1223 (3rd Cir. 1974).

Insofar as *People* v. *Stroble, supra,* is based on a holding that the pendency of petitioner's habeas corpus petition stayed the 120 day period specified in the Interstate Agreement on Detainers, the Michigan Court of Appeals erred. To imply *after the fact* that the period of time involved in the filing and disposition of a habeas corpus petition prejudiced the petitioner in asserting other important rights, in this case the right to be tried within 120 days under the Agreement, would tend to chill the use of the Great Writ and cannot be sanctioned. Prisoners must be free to use the writ without fear of repercussions. If the delay in trying petitioner on the murder charge could be explained only on the basis of the pendency of his habeas proceeding, his prosecution on murder charges would be untimely and the petitioner would be ordered discharged from custody. However, there are other questions this court must resolve.

The facts as alleged in the pleadings filed in this cause show: (1) that petitioner was tried on the assault charge within 120 days of his arrival in Michigan; (2) that his trial for murder, originally scheduled for October 23, 1968, was scheduled within the 120 day period; (3) that the preliminary hearing had been continued for 14 days in July; (4) that petitioner's counsel filed a motion to suppress on October 26, well within the 120 day period as extended; (5) that this motion involving an alleged confession was decided on November 22; (6) that the trial date

was continued on October 23 and that petitioner was tried on December 16; finally (6) that the Court of Appeals held all of this to be good cause under the Interstate Agreement on Detainers.

One narrow issue presently before the court concerns who must show whether the requirements of the Interstate Agreement on Detainers as to granting continuances have been met.[3]

A petitioner for a writ of habeas corpus must normally establish that his conviction and confinement are invalid. *Ricon* v. *Garrison*, 517 F.2d 628 (4th Cir. 1975); *Clayton* v. *Haynes*, 517 F.2d 577 (4th Cir. 1975); *Faught v. Cowan*, 507 F.2d 273 (6th Cir. 1974), *cert. denied*, 421 U.S. 919, 95 S.Ct. 1583, 413 L.Ed.2d 786; *Webster v. Estelle*, 505 F.2d 926 (5th Cir.), *cert denied*, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed2d 785 (1975). Petitioner has not established that continuances were granted in violation of the statutory requirements, but rather that the record does not affirmatively show that the statutory requirements were met. State court proceedings, however, are presumed correct in the absence of evidence to the contrary. In *Faught v. Cowan, supra*, the court stated that it cannot assume flagrant irregularities in state trial proceedings. *See also, Groppi v. Leslie*, 436 F.2d 326, 329 (7th Cir. 1970), *rev'd on other grounds*, 404 U.S. 496, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972).

In the instant case petitioner has not alleged that he was not present in court on any of the days that continuances were granted, nor has he filed any affidavits indicating that counsel

[3]

Petitioner's counsel has filed an affidavit in response to the motion for summary judgment indicating that he has examined the trial record and that such record does not show that the continuances granted in the trial proceedings were granted upon motions for adjournments or does the record show that there were pending motions on the date originally set for the murder trial.

was not present on those dates or that such continuances were not reasonable or necessary. Thus, if it were necessary to de-

[408 F. Supp. 635]

termine the *fact* of petitioner's or his counsel's presence in open court as required by the compact, this matter would be set for an evidentiary hearing. At that hearing the court would determine if petitioner had met his burden of proof with regard to these matters. However, this factual determination is not essential. Assuming petitioner could meet his burden of proof with regard to the above, the court still would have to decide if the petitioner should be released in the light of the following relevant considerations.

The purpose of the Interstate Agreement is to provide orderly and expeditious disposition of untried criminal charges, but the Agreement is silent as to the proper procedure when an out of state prisoner faces multiple criminal charges in one jurisdiction. If petitioner's assault trial had lasted 121 days and no formal continuance had been granted, is it reasonable to assume that petitioner could not have been tried on the murder charge? Such a result would be manifestly absurd in view of the purpose of the Agreement. Therefore, this court agrees with the holding of the Michigan Court of Appeals that where petitioner was tried on one of the criminal charges pending against him within the 120 day period, his rights under the Agreement were not violated when his second trial did not start within the *same* 120 day period. Petitioner's second trial

began within a reasonable period after the completion of the first trial.[4]

II

Petitioner's last claim is that Michigan waived its right to imprison him on his murder conviction by sending petitioner to Jackson on December 20, 1968 contrary to the provisions of the Interstate Agreement and then returning him to New York after sentencing on his assault conviction on February 5, 1969. The Interstate Agreement provides that an out of state prisoner temporarily present in the state for purposes of trial be housed in a jail or other pre-trial detention facility. The Agreement also clearly provides that *legal* custody of the prisoner remains with the sending state. Thus, a prisoner in temporary custody continues serving time on his original sentence.

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[4]

State courts have routinely dismissed pending criminal charges against prisoners incarcerated in other jurisdictions because the prosecution failed to bring them to trial within 180 days after they made a written demand for trial as provided by Article III of the Interstate Agreement. *Pittman v. State*, 301 A.2d 514 (Del.Super.Ct.1973); *Hoss v. Mason*, 46 N.J. 526, 218 N.E.2d 158 (1966); *People v. Esposito*, 201 N.Y.S.2d 83 (Queens County Ct.1960). In *United States v. Mason*, 372 F.Supp. 651, 652 (N.D.Ohio 1973), the court held that where the prisoner had made a request for a disposition of federal charges pending against him under Article III, the 180 day period continued to run at those times when the petitioner was incarcerated in his home state available for trial. During such time as the prisoner was held in the temporary custody of another state, the 180 day period was tolled. Following the rationale of this case, while petitioner and the state were preparing for trial on the assault charge, the 120 day period should be considered tolled on the murder charge even though both charges were pending in the same state. While petitioner was preparing for trial on the assault charge, he should have been considered unavailable for trial on the murder charge.

The record is clear that Michigan authorities erred in sending petitioner to Jackson on December 20th rather than to a jail or temporary facility. Moreover, respondent's answers to Interrogatories indicate that Michigan authorities considered Stroble to have begun serving his murder sentence at Jackson on that date. Petitioner relies on *People ex rel. Barrett v. Bartley*, 383 Ill. 437, 50 N.E.2d 517 (1943), in support of his claim that Michigan voluntarily released him to New York in February, 1969, and thereby waived service of his sentence. *Bartley* held that where a prisoner begins serving a sentence in one state which interrupts service of the sentence to surrender the prisoner to another state for service of another sentence, the sending state thereby relinquished jurisdiction over the prisoner, in effect pardoning the prisoner. *Bartley* is inapplicable since Michigan received temporary custody of Stroble from New York only for the purpose of trial. Interstate [400 F. Supp. 636] Agreement on Detainers, Art. V(d). Michigan did not have legal custody and throughout Stroble's stay in Michigan, he was serving his New York sentence. Thus, the respondent's admission that Stroble began serving his life sentence at Jackson on December 20, 1968 is irrelevant.

This court cannot find that Michigan's technical violation of the Agreement, *i. e.* housing petitioner at Jackson for a two month period, divested New York of legal custody over Stroble. To adopt such a rigid view would violate the purpose of the Interstate Agreement. The signatories to the Agreement did not intend to let technical violations operate to release duly convicted prisoners from serving the balance of their sentences, since Article IX of the Agreement provides that it should be liberally construed to effectuate its purposes. The Agreement is intended to facilitate inter-state movement of prisoners to clear up pending charges in other jurisdictions.

States would never utilize the Agreement if they risked losing jurisdiction over a prisoner by so doing. The court concludes that Michigan's technical violation of the Agreement, while not to be condoned, was insufficient to constitute a waiver of Michigan's right to imprison petitioner upon completion of his New York sentence.

The respondent's motion to dismiss or in the alternative motion for summary judgment is granted.

So ordered.

[547 F. 2d 339]

Bernard STROBLE, Petitioner,

v.

Charles E. EGELER, Warden, State Prison of Southern Michigan, Respondent.

No. 76-1644.

United States Court of Appeals,
Sixth Circuit.

Argued Dec. 16, 1976.

Decided Jan. 13, 1977.

[547 F. 2d 340]

Neal Bush, Ernest Goodman, Detroit, Mich., W. Haywood Burns, New York City, for petitioner.

Frank J. Kelley, Atty. Gen. of Michigan, Robert A. Derengoski, Jann Ryan Baugh, Thomas L. Casey, Lansing, Mich., for respondent.

Before PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

PER CURIAM.

Petitioner-appellant perfected this appeal from an order of the district court denying his petition for habeas corpus relief, and the case has been submitted on the record on appeal and on the briefs and oral arguments of counsel. The petition, as does this appeal, represents a collateral attack on his conviction in a Michigan state court of first degree murder.

So far as they are pertinent to this opinion, the facts established by the record are that while appellant was serving a sentence for an unrelated offense in the State of New York, he was on June 27, 1968, brought back to Michigan pursuant to the Interstate Agreement on Detainers to face charges of assault with intent to commit murder and of first degree murder. He was indicted for both offenses, and a trial concluded on October 8, 1968, on the assault charge, resulted in his conviction of the lesser included offense of assault with intent to do bodily harm less than murder. Thereafter, a first degree murder trial was scheduled for October 28, 1968, but on October 11, 1968, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan and the state authorities continued the trial pending a determination of the habeas corpus action. The district court dismissed the habeas corpus petition on November 7th and in a trial conducted from December 16, 1968, to December 20, 1968, appellant was found guilty of first degree murder and sentenced to life imprisonment.

Following procedures not here material, appellant was returned to New York and then transported back to Michigan, where he is presently serving sentences imposed for the assault and murder convictions in the custody of the respondent-appellee.

It is concluded that appellant's contention that Michigan waived its right to imprison the appellant on the murder conviction when its authorities returned him to New York after he had begun serving the life sentence in Michigan through administrative mistake is without merit. However, his other contention requires consideration.

That contention arises out of the fact that the Interstate Agreement on Detainers requires that a person returned thereunder must be brought to trial within a 120 day period, and 173 days intervened between appellant's return to Michigan and the murder trial. The Michigan state court of appeals held that because the delay beyond the 120 day period resulted from appellant's institution of the habeas corpus proceedings, and the trial commenced within a reasonable time after the disposition thereof, the period of limitation had been tolled. The district court agreed with petitioner that the habeas corpus proceeding did not toll the 120 day period, but held that the Interstate Agreement, which it properly found provided a basis for the present attack, was nevertheless not violated because the stay in the proceedings resulted from the granting of valid continuances in the murder trial. It is this determination by the trial court which is particularly under attack in this appeal and which forms the basis for the remand which we conclude to be required.

In regard to such continuances, appellant strenuously argues that no delay in the murder trial should have been granted except for good cause shown in an open court proceeding, following notification to him, and after affording him an opportunity to be present with counsel. While not presently passing on the legal consequences of such failures (if any occurred), we observe that the present record affords no proper basis for consideration of the issue sought to be raised.

[547 F. 2d 341]

It is therefore directed that the district court determine on the basis of an evidentiary hearing or otherwise whether the continuances were on the basis of good cause shown after notification and with appellant and counsel present. If there was failure to observe one or more of these provisions, the court should then determine whether prejudice to the appellant resulted therefrom, and if not, whether non-prejudicial violation of the Compact nonetheless mandates vitiation of the trial and sentence and dismissal of the indictment.

Remanded.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BERNARD STROBLE, Petitioner, v. CHARLES ANDERSON, Warden, State Prison of Southern Michigan, Respondent.	Civil Action No. 5-71943

MEMORANDUM OPINION AND ORDER

This case is before the court following a remand from the Court of Appeals which directed that an evidentiary hearing be conducted for the purpose of determining several questions relevant to petitioner's habeas corpus application. Peti-

tioner has challenged his detention by the State of Michigan claiming that the state violated provisions of the Interstate Agreement on Detainers, M.C.L.A. 780.601 *et seq.*, ["Interstate Agreement"] in its prosecution of petitioner for murder. This court dismissed the habeas corpus petition in an opinion reported at 408 F. Supp. 630, and the petitioner appealed. The Court of Appeals, in a decision reported at 547 F.2d 339, remanded and directed this court to:

> ". . . determine on the basis of an evidentiary hearing or otherwise whether the continuances were on the basis of good cause shown after notification and with appellant and counsel present. If there was failure to observe one or more of these provisions the court should then determine whether prejudice to the appellant resulted therefrom and if not whether non-prejudicial violation of the Compact nonetheless mandates vitiation of the trial and sentence and dismissal of the indictment." 547 F.2d at 341.

This court has conducted an evidentiary hearing and counsel for the parties have been given a full opportunity to argue the questions involved. The findings of the court follow.

I. The three provisions of the Interstate Agreement which are relevant in this matter are Articles IV(c), IV(e) and VI(a).

Article IV (c) provides:

> "(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Article IV(e) provides:

> "(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Article VI(a) provides:

> "(a) In determining the duration and expiration dates of the time periods provided in Article III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter."

II. Compliance with Article IV(c) in granting continuances.

A. The continuance of October 10, 1968 and the continuance of December 2, 1968 were granted for "good cause" as required by Article IV(c) of the Interstate Agreement. When a defendant has been involved in a highly publicized trial lasting for more than a week and ending on October 8, a delay from an October date for the murder trial to December 2 to be certain that a fair trial can be had is for good cause. When the judge to whom the case is assigned is on trial on the day the matter is set for trial, a delay of two weeks to get a judge is for good cause.

B. The continuances granted on October 10, 1968 and December 2, 1968 were "necessary" and "reasonable"

as required by Article IV(c). The delay on December 2 was necessary to be certain that a fair trial could be had, and the time period was reasonable for the same reason, even though a new jury could have been drawn as early as November. The extra month to December 2 provided a reasonable time to permit the publicity surrounding the defendant as a result of the early October trial to subside. The delay from December 2 to December 16 was necessary because the judge to whom the case was assigned was on trial and it was reasonable being only for a period of two weeks.

C. Neither the continuance of October 10, 1968 nor the continuance of December 2, 1968 was granted in "open court" as required by Article IV(c).

D. The term "in open court" in Article IV(c) means that there must be a judge present in a courtroom conducting the proceedings in which the continuance is granted.

E. Compliance with the Article IV(c) requirement of "the prisoner or his counsel being present" is unclear from the evidence presented. The record is clear that the petitioner was not present. It is not clear, however, whether petitioner's counsel was present at the time of the granting of the continuances.

F. The evidence presented indicates that it is reasonably probable that the defendant or his counsel agreed to the continuances and that these continuances were approved by a judge within a few days of the time the clerk granted them.

III. Prejudice and dismissal of the indictment under Article IV(e).

A. The petitioner has shown no prejudice that resulted from the delay in his murder trial.

B. The Interstate Agreement does not require a showing of prejudice before an indictment must be dismissed for violation of the time provisions of the Agreement.

IV. Tolling of the time period because of two separate charges under Article VI(a) of the Interstate Agreement.

A. The defendant was charged with two different offenses, assault with intent to commit murder and murder, and returned to the state on June 27, 1968 to face both charges.

B. The trial date for the assault with intent to commit murder charge was set on August 15, 1968 and the trial of the assault charge was begun October 2 and concluded on October 8, 1968. On August 15, 1968, the murder charge was set for trial on October 23, 1968.

C. A person who is preparing for the trial and on trial on a charge of assault with intent to commit murder is "unable to stand trial" for the second offense from the time the first charge is assigned for trial within the meaning of Article VI(a) of the Interstate Agreement. If the state had attempted to try both charges during this time or had required the defendant to prepare for the trial of these two serious crimes at the same time, prejudice to the defendant would have resulted. This is clearly a reason why under the agreement a person would be "unable to stand trial."

D. Petitioner was thus "unable to stand trial" under Article VI(a) on the murder charge for 54 days, and the period of time under the Interstate Agreement was tolled for a period of 54 days.

E. Petitioner's murder trial was commenced on the 173rd day after the arrival of the petitioner in Michigan for prosecution under the Interstate Agreement on two charges; (1) assault with intent to commit murder, and (2) murder, which when reduced by 54 days establishes that the murder trial was commenced within 119 days.

Accordingly, the petitioner's request for a writ of habeas corpus is denied.

So ordered.

Charles W. Joiner /s/
CHARLES W. JOINER
United States District Judge

Dated: May 6, 1977
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BERNARD STROBLE, Petitioner, v. CHARLES ANDERSON, Warden, State Prison of Southern Michigan, Respondent.	Civil Action No. 5-71943

JUDGMENT

The petition for a writ of habeas corpus and the respondent's motion to dismiss or in the alternative motion for summary judgment came on for hearing before the court, the Honorable Charles W. Joiner, United States District Judge, presiding, and the issues having been considered and a decision rendered in a memorandum opinion and order dated May 6, 1977,

IT IS ORDERED AND ADJUDGED that the respondent's motion to dismiss or in the alternative motion for summary judgment be granted and the petition for a writ of habeas corpus be denied.

Dated at Detroit, Michigan, this 6th day of May, 1977.

HENRY R. HANSSEN /s/
Henry R. Hanssen
Clerk of the Court
by Sharon M. Bruley /s/
Deputy Clerk

Approved as to form: CWJ

No. 77-1489

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BERNARD STROBLE, Petitioner-Appellant, v. CHARLES ANDERSON, Warden, State Prison of Southern Michigan, Respondent-Appellee.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed November 1,1978.

Before: PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and PECK, Senior Circuit Judge.

EDWARDS, Circuit Judge. It is a requirement of the law of our land that it be enforced in accordance with the procedures contained therein. Justice Felix Frankfurter summarized the justification for this sometimes onerous burden:

> The safeguards of "due process of law" and "the equal protection of the laws" summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. *The history of American freedom is, in no small measure, the history of procedure. Malinski* v. *New York*, 324 U.S. 401, 413-14 (1945) (emphasis added).

This is the second time this case has been before this court. After the first appellate hearing, we remanded the case to the District Court for resolution of certain additional issues of fact deemed essential to proper resolution. Many [Slip Opinion, p. 2] of the facts which produce the legal issues with which we deal were set out in our remand opinion:

> Petitioner-appellant perfected this appeal from an order of the district court denying his petition for habeas corpus relief. . . . The petition, as does this appeal, represents a collateral attack on his conviction in a Michigan state court of first degree murder.
>
> So far as they are pertinent to this opinion, the facts established by the record are that while appellant was serving a sentence for an unrelated offense in the State of New York, he was on June 27, 1968, brought back to Michigan pursuant to the Interstate Agreement on Detainers to face charges of assault with intent to commit murder and of first degree murder. He was indicted for both offenses, and a trial concluded on October 8, 1968, on the assault charge, resulted in his conviction of the lesser included offense of assault with intent to do bodily harm less than murder. Thereafter, a first degree murder trial was scheduled for October 23, 1968, but on October 11, 1968, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan and the state authorities continued the trial pending a determination of the habeas corpus action. The district court dismissed the habeas corpus petition on November 7th and in a trial conducted from December 16, 1968, to December 20, 1968, appellant was found guilty of first degree murder and sentenced to life imprisonment.
>
> Following procedures not here material, appellant was returned to New York and then transported back to Michigan, where he is presently serving sentences imposed for the assault and murder convictions in the custody of the respondent-appellee.

It is concluded that appellant's contention that Michigan waived its right to imprison the appellant on the murder conviction when its authorities returned him to New York after he had begun serving the life sentence

[Slip Opinion, p. 3]

in Michigan through administrative mistake is without merit. However, his other contention requires consideration.

That contention arises out of the fact that the Interstate Agreement on Detainers requires that a person returned thereunder must be brought to trial within a 120 day period, and 173 days intervened between appellant's return to Michigan and the murder trial. The Michigan state court of appeals held that because the delay beyond the 120 day period resulted from appellant's institution of the habeas corpus proceedings, and the trial commenced within a reasonable time after the disposition thereof, the period of limitation had been tolled. The district court agreed with petitioner that the habeas corpus proceeding did not toll the 120 day period, but held that the Interstate Agreement, which it properly found provided a basis for the present attack, was nevertheless not violated because the stay in the proceedings resulted from the granting of valid continuances in the murder trial. It is this determination by the trial court which is particularly under attack in this appeal and which forms the basis for the remand which we conclude to be required.

In regard to such continuances, appellant strenuously argues that no delay in the murder trial should have been granted except for good cause shown in an open court

proceeding, following notification to him, and after affording him an opportunity to be present with counsel. While not presently passing on the legal consequences of such failures (if any occurred), we observe that the present record affords no proper basis for consideration of the issue sought to be raised.

It is therefore directed that the district court determine on the basis of an evidentiary hearing or otherwise whether the continuances were on the basis of good cause shown after notification and with appellant [or] counsel present. If there was failure to observe one or more of these provisions, the court should then deter-

[Slip Opinion, p. 4]

mine whether prejudice to the appellant resulted therefrom, and if not, whether non-prejudicial violation of the Compact nonetheless mandates vitiation of the trial and sentence and dismissal of the indictment.

Remanded.

Stroble v. *Egeler*, 547 F.2d 339 (6th Cir. 1977).

On remand the District Judge resolved the fact disputes as follows:

This court has conducted an evidentiary hearing and counsel for the parties have been given a full opportunity to argue the questions involved. The findings of the court follow.

• • •

II. Compliance with Article IV(c) in granting continuances.

A. The continuance of October 10, 1968 and the continuance of December 2, 1968 were granted for "good cause" as required by Article IV(c) of the Interstate Agreement. When a defendant has been involved in a highly publicized trial lasting for more than a week and ending on October 8, a delay from an October date for the murder trial to December 2 to be certain that a fair trial can be had is for good cause. When the judge to whom the case is assigned is on trial on the day the matter is set for trial, a delay of two weeks to get a judge is for good cause.

B. The continuances granted on October 10, 1968 and December 2, 1968 were "necessary" and "reasonable" as required by Article IV(c). The delay on December 2 was necessary to be certain that a fair trial could be had, and the time period was reasonable for the same reason, even though a new jury could have been drawn as [Slip Opinion, p. 5] early as November. The extra month to December 2 provided a reasonable time to permit the publicity surrounding the defendant as a result of the early October trial to subside. The delay from December 2 to December 16 was necessary because the judge to whom the case was assigned was on trial and it was reasonable being only for a period of two weeks.

C. Neither the continuance of October 10, 1968 nor the continuance of December 2, 1968 was granted in "open court" as required by Article IV(c).

D. The term "in open court" in Article IV(c) means that there must be a judge present in a court room conducting the proceedings in which the continuance is granted.

E. Compliance with the Article IV(c) requirement of "the prisoner or his counsel being present" is unclear from the evidence presented. The record is clear that the petitioner was not present. It is not clear, however, whether petitioner's counsel was present at the time of the granting of the continuances.

F. The evidence presented indicates that it is reasonably probable that the defendant or his counsel agreed to the continuances and that these continuances were approved by a judge within a few days of the time the clerk granted them.

III. Prejudice and dismissal of the indictment under Article IV(e).

A. The petitioner has shown no prejudice that resulted from the delay in his murder trial.

B. The Interstate Agreement does not require a showing of prejudice before an indictment must [Slip Opinion, p. 6] be dismissed for violation of the time provisions of the Agreement.

The District Judge then denied the writ because in his view the 120 day limitation had been "tolled."

IV. Tolling of the time period because of two separate charges under Article VI(a) of the Interstate Agreement.

A. The defendant was charged with two different offenses, assault with intent to commit murder and mur-

der, and returned to the state on June 27, 1968 to face both charges.

B. The trial date for the assault with intent to commit murder charge was set on August 15, 1968 and the trial of the assault charge was begun October 2 and concluded on October 8, 1968. On August 15, 1968, the murder charge was set for trial on October 23, 1968.

C. A person who is preparing for the trial and on trial on a charge of assault with intent to commit murder is "unable to stand trial" for the second offense from the time the first charge is assigned for trial within the meaning of Article VI(a) of the Interstate Agreement. If the state had attempted to try both charges during this time or had required the defendant to prepare for the trial of these two serious crimes at the same time, prejudice to the defendant would have resulted. This is clearly a reason why under the agreement a person would be "unable to stand trial."

D. Petitioner was thus "unable to stand trial"under Article VI(a) on the murder charge for 54 days, and the period of time under the Interstate Agreement was tolled for a period of 54 days.

[Slip Opinion, p. 7]

E. Petitioner's murder trial was commenced on the 173rd day after the arrival of the petitioner in Michigan for prosecution under the Interstate Agreement on two charges; (1) assault with intent to commit murder, and (2) murder, which when reduced by 54 days establishes that the murder trial was commenced within 119 days.

Accordingly, the petitioner's request for a writ of habeas corpus is denied.

Stroble v. *Anderson*, No. 5-71943 (E.D. Mich. May 6, 1977) at 5-6.

On this appeal appellant argues that this record shows three specific failures on the part of the prosecutor and the cout to follow the Interstate Agreement:

1) Failure to try appellant within 120 days.

2) Failure to seek a continuance as provided by the Agreement when appellant sought habeas.

3) Failure, when continuances were granted, to comply with I.A.D.'s requirements of showing of "good cause," "in open court," "the prisoner or his counsel being present."

The state, of course, concedes in this appeal that Michigan did not follow the literal language of the Interstate Agreement on Detainers and try appellant within 120 days. But it resists application of the rigorous sanction (dismissal of the indictment with prejudice) provided by the Agreement. The appellee's claims include:

1) The District Judge was right in holding that appellant was "unable" to stand trial within the meaning of the Agreement.

2) Since the court did docket this continuance, a presumption of knowledge, presence, and agreement with the continuance on the part of defendant and defendant's counsel should be indulged.

[Slip Opinion, p. 8]

3) Failing the above, the writ should still not issue since no "prejudice" to defendant should be found.

Resolution of these conflicting views requires us to turn to the history of the writing and execution of the Interstate Agreement and its approval by the United States.

This court has already examined the history and purposes of the Interstate Agreement on Detainers:

> The Agreement was first promulgated by the Council of State Governments in 1957.[1] It was adopted by Congress in 1970, and 46 states, the District of Columbia and the United States are signatories. The Agreement was designed to facilitate the disposition of charges in one jurisdiction when the accused is incarcerated in another jurisdiction. Some of the reasons for the agreement are set forth in Article I:
>
> > The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of

> > cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.
>
> • • •
>
> The Agreement is applicable to situations in which one participating jurisdiction has lodged a detainer for a prisoner in another participating jurisdiction where the prisoner is incarcerated. Article III provides that a [Slip Opinion, p. 9] prisoner can demand to be brought to trial within 180 days on any untried indictment, information or complaint which is the basis for a detainer lodged against him. If the prisoner is not brought to trial within the 180 day limit, the appropriate court of the jurisdiction in which the outstanding charge is pending is required to dismiss the charge with prejudice and the detainer thereupon ceases to have effect. The time limit can be extended for good cause in open court, if either the prisoner or his counsel are present. Thus, Article III provides a prisoner with a procedure for bringing about a prompt disposition of detainers placed against him.

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[1] Council of State Governments Suggested Legislation 167 (1959).

Ridgeway v. *United States*, 558 F.2d 357, 359 (6th Cir. 1977).

The court then said:

> [W]e look to the origins of the Agreement.[5] A detainer is simply a notice to prison authorities that charges are pending against an inmate elsewhere, requesting the custodian to notify the sender before releasing the inmate. The detainer itself does nothing to affect the prosecution

of an inmate. Filing a detainer is an informal process which does not bind the authorities to act.[6] Generally, a penal institution will recognize a detainer lodged by any person who has authority to take an inmate into custody. In most instances, the prosecutor charged with the task of bringing the case to disposition files the detainer, but, if the case has not yet reached the stage of a formal indictment or information, the detainer may be filed by the police.[7]

Detainers have been filed with little consideration of whether the inmate will be brought to trial. In some cases they may be withdrawn as a matter of prosecutorial discretion. Some detainers apparently have been filed for punitive reasons.[8] They are withdrawn shortly before the inmate's release, having served their purpose by [Slip Opinion, p. 10] limiting his prison privileges and preventing parole. The dangers in this practice were discussed by Judge Sobeloff in *Pitts* v. *North Carolina*, 395 F.2d 182, 187 (4th Cir. 1968):

> Detainers, informal aides in interstate and intra-state criminal administration, often produce serious adverse side-effects. The very informality is one source of the difficulty. Requests to an imprisoning jurisdiction to detain a person upon his release so that another jurisdiction may prosecute or incarcerate him may be filed groundlessly, or even in bad faith, as suspected by the appellant in this case. The accusation in a detainer need not be proved; no judicial officer is involved in issuing a detainer. As often happens, the result of the then unestablished charge upon which the detainer in this case rested was that the detainee was seriously hampered in his quest for a parole or commutation.

The effects of a detainer on an inmate can be profound. Extensive delay in bringing the prisoner to trial is only one of the problems. Many prison authorities regard convicts subject to detainers as potential escape risks, and, therefore, restrict their activities and privileges.[9] An inmate may be denied institutional privleges resulting in decreased freedom of movement, and he may be precluded from preferred living quarters such as dormitories.[10] Such an inmate may be denied trusty status,[11] or he may be considered ineligible to reside on an "honor farm" or to take part in a furlough program. Detainers may be taken into account by parole boards and thus may affect the length of a sentence. A detainer can also have a psychological effect upon an inmate, thus frustrating rehabilitation. As the Senate Report noted:[12]

> [W]hen detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without know- [Slip Opinion, p 11] ing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing. Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound pre-release program.

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[5]

See generally, Meyer, Effective Utilization of Criminal Detainer Procedures, 61 Ia.L.Rev. 659 (1976); Yackle, Taking Stock of Detainer Statutes, 8 Loy.L.A.L.Rev. 88 (1975); Dauber, Reforming the Detainer System: A Case Study, 7 Crim.L.Bull. 669 (1971); Wexler & Hershey, Criminal Detainers in a Nutshell, 7 Crim.L.Bull. 753 (1971); Note, Extending the *Smith* v. *Hooey* Duty to the Holding Jurisdiction, 23 Me.L.Rev. 201 (1971); Note, The Inter-

state Criminal Detainer and the Sixth Amendment, 23 Ark.L.Rev. 634 (1970); Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, 77 Yale L.J. 767 (1968); Schindler, Interjurisdictional Conflicts and the Right to a Speedy Trial, 35 U.Cin.L.Rev. 179 (1966); Note, Detainers and the Correctional Process, 1966 Wash.U.L.Q. 417; Comment, The Detainer System and the Right to a Speedy Trial, 31 U.Chi.L.Rev. 535 (1964); Note, Convicts – The Right to Speedy Trial and the New Detainer Statutes, 18 Rut.L.Rev. 828 (1964).

[6]

Note, Detainers and the Correctional Process, *supra* note 5, 1966 Wash.U.L.Q. at 417.

[7]

Yackle, Taking Stock of Detainer Statutes, *supra* note 5, 8 Loy.L.A.L.Rev. at 90.

[8]

Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, *supra* note 5, 77 Yale L.J. at 773.

[9]

Note, Detainers and the Correctional Process, *supra* note 5, 1966 Wash.U.L.Q. at 419.

[10]

Yackle, Taking Stock of Detainer Statutes, *supra* note 5, 8 Loy.L.A.L.Rev. at 91.

[11]

Note, Detainers and the Correctional Process, *supra* note 5, 1966 Wash.U.L.Q. at 419. Sometimes the inmate would be automatically held under maximum security or be declared ineligible for special work programs, athletic programs, release for visits to relatives' death beds, or funerals. *United States* v. *Ford*, 550 F.2d 732 (2d Cir. 1977).

[12]

S.Rep. No. 91-1356 [91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News, at 4866].

Id. at 360-61.

[Slip Opinion, p. 12]

These problems led to lengthy negotiations between representatives of a number of states and the final drafting of the

present agreement. The provision requiring the receiving state to try the prisoner sent by another state within 120 days, or return him or dismiss the indictment, was a major feature of the agreement designed to make it enforceable.

Although the original effort to draft this agreement came from the states and from private organizations, the United States began to take a strong interest in the matter. Ultimately this led to the United States both joining the agreement as a party on its own behalf and on behalf of the District of Columbia and approving the compact between the states under the provision of art. I, sec. 10 cl. 3 of the United States Constitution which provides:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

In *United States* v. *Mauro*, 98 S.Ct. 1834 (1978), the Supreme Court has defined the purpose of article IV and traced the role of the United States in adopting it.

> The Joint Committee on Detainers was later reconstituted under the auspices of the Council of State Governments. Then known as the Committee on Detainers and Sentencing and Release of Persons Accused of Multiple Offenses, it held meetings in 1955 and 1956, which resulted in the development and approval of several proposals concerning detainers. Among the proposals was a draft version of the Agreement. In April 1956 this proposal was reviewed and approved by a conference jointly sponsored by the American Correctional Association, the

Council of State Governments, the National Probation and Parole Association, and the New York [Slip Opinion, p. 13] Joint Legislative Committee on Interstate Cooperation.[17] Following the endorsement of the Agreement by this conference, the Council of State Governments included it within its Suggested State Legislation Program for 1957.

The Agreement, in the form adopted by the United States and other member jurisdictions, sets forth the findings upon which it is based and its purpose in Art. I. It notes that "charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." Accordingly, its purpose is to encourage the expeditious disposition of such charges and to provide cooperative procedures among member States to facilitate such disposition.

The central provisions of the Agreement are Art. III and Art IV. Article III provides a procedure by which a prisoner against whom a detainer has been filed can demand a speedy disposition of the charges giving rise to the detainer. The warden of the institution in which the prisoner is incarcerated is required to inform him promptly of the source and contents of any detainer lodged against him and of his right to request final disposition of the charges. Art. III(c). If the prisoner does make such a request, the jurisdiction that filed the detainer must bring him to trail within 180 days.[18] Art. III(a). The prisoner's request operates as a request for the final disposition of all untried charges underlying detainers filed against him by that State, Art. III (d), and is deemed to be a waiver of extradition. Art. III(e).

Article IV provides the means by which a prosecutor who has lodged a detainer against a prisoner in another State can secure the prisoner's presence for disposition of the outstanding charges. Once he has filed a detainer against the prisoner, the prosecutor can have him made available by presenting to the officials of the State [Slip Opinion, p. 14] in which the prisoner is incarcerated "a written request for temporary custody or availability . . . ."[19] Art. IV(a).

Two important limitations, previously referred to, are placed on a prosecuting authority once it has obtained the presence of a prisoner pursuant to Art. IV. Article IV(c) states that

> "[i]n respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

And Art. IV(e) requires the receiving State to try the prisoner on the outstanding charge before returning him to the State in which he was previously imprisoned:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Article V(c) similarly provides that the "indictment, information, or complaint on the basis of which the detainer has been lodged" shall be dismissed if the prisoner is not brought to trial within the period specified in Art. IV(c).

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[17]

Among the 60 persons in attendance at the conference were representatives of the United States Department of Justice.

[18]

For good cause shown in open court, with either the prisoner or his counsel present, the court having jurisdiction over the matter may grant any necessary or reasonable continuance.

[19]

Article IV(a) states:

"The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be [Slip Opinion, p. 15] entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated:

Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner."

United States v. *Mauro, supra* at 1842-43.

Thus Art. IV is unequivocal in its language and so is the interpretation and application of it by the United States Supreme Court.

We also believe that the District Judge was in error in holding as a matter of law that the expiration of the 120 day time limit was tolled under Art. VI. Article VI in full reads:

(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

Art. VI.

This record does not disclose any determination by the state courts that appellant was "unable" to stand trial. He was in Michigan within the jurisdiction of the trial court and there is no showing in this record that he was physically or mentally disabled. Appellant never sought a postponement of his murder trial because of the fact that it was at one time scheduled to begin two weeks after completion of the assault with intent to murder trial. Neither did the prosecutor. In fact, there is no indication that any judge [Slip Opinion, p. 16] ever considered any rationale now urged as justification for the violation of the I.A.D.

We believe that Art. VI was written as a protective measure for a transferred prisoner. It cannot appropriately be turned from a shield for the defendant into a sword for the prosecution.

If we were to consider that the District Judge was engaged in a finding of fact in holding appellant "unable to stand trial," we would conclude that the finding was unsupported by this record and was clearly erroneous.

The other findings of fact of the District Judge include, "Petitioner's murder trial was commenced on the 173rd day after the arrival of the petitioner in Michigan for prosecution under the Interstate Agreement. . . ." This was, of course, a clear cut violation of Art. IV(c) and V(c) unless there was a valid continuance.

These articles provide:

> (c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
>
> Art. IV(c).
>
> (c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action of the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.
>
> Art. V(c).
>
> [Slip Opinion, p. 17]

As noted above, the District Judge found on remand that:

> Neither the continuance of October 10, 1968 nor the continuance of December 2, 1968 was granted in "open court" as required by Article IV(c).
>
> The term "in open court" in Article IV(c) means that there must be a judge present in a courtroom conducting the proceedings in which the continuance is granted.
>
> Compliance with the Article IV(c) requirement of "the prisoner or his counsel being present" is unclear from the evidence presented. The record is clear that the petitioner was not present. It is not clear, however, whether petitioner's counsel was present at the time of the granting of the continuances.

This record simply does not indicate that the disputed continuances were ever granted "on good cause shown in open court." The record shows no motion for continuance filed by petitioner or his counsel, nor does it show notice to them of such a motion by the prosecution or the court itself, nor does it show that either petitioner or his counsel were present before a judge when the continuances were granted or ever subsequently agreed to them. The District Judge's statement that "it is reasonably probable that the defendant or his counsel agreed to the continuances" is not supported by this record, and hence, is clearly erroneous. There is no testimony by any witness for the state concerning any agreement for adjournment by defendant or defendant's counsel. And both denied making any such agreement.

We recognize that the state argues that we should accept the "informal" practices of the Detroit Recorder's Court of that period as satisfying the strict terms of the I.A.D.

The State's brief says:

In summary, the testimony at the evidentiary hearing indicated that, during the period in question, there exist-

[Slip Opinion, p. 18]

ed in Recorder's Court a practice and custom wherein scheduled proceedings were frequently adjourned, in advance of the date set, by a relatively informal method. Such adjournments were not granted, however, without the parties being notified. In addition, any such continuances were ultimately authorized by the Court. Finally, it is clear that if objections were raised to the proposed continuance, the parties would bring the matter before the judge for resolution.

The trouble with this argument is that the informal practices described are in direct conflict with Art. IV(c) of the Interstate Agreement on Detainers. Article IV(c) requires that "good cause [be] shown in open court" with defendant or his counsel present. The District Judge correctly recognized that the term "open court" meant with a judge on the bench.

In fact, it does not appear from this record that anyone on the staff of the Wayne County Prosecutor (who filed the detainer) or on the staff of Recorder's Court had any acquaintance at all with the stringent terms of the Interstate Agreement on Detainers which the State of Michigan had formally adopted. A Deputy Clerk of Recorder's Court testified extensively at the remand hearing before the District Judge concerning the "informal" continuance procedure.

He testified that the continuance of October 2 had been entered in his handwriting, while the one of December 2 was in the handwriting of another clerk, and that in neither instance was there any notation (as required by court custom) of the

presence of a judge on the bench at the time the continuance was entered. In fact, the Recorder's Court record and the evidence at the habeas hearing do not show any explanation of the continuances except routine docket management by court clerks. Careful examination of this record shows no better explanation of the critical violation of the I.A.D. than the testimony of the Deputy Clerk that he had never heard

[Slip Opinion, p. 19]

of the I.A.D. IV(c) 120 day limitation until a few days before his testimony in federal court in this case:

Q Just a couple more questions, Mr. Krause. You were never notified by anybody about any 120-day rule or speedy trial problem in this case?

A None that I recall at all. In fact, I don't remember it at all because I was quite surprised. I heard about such a rule the last day or so.

Whatever merits informality may have in some situations, it is obviously inconsistent with the highly structured procedural requirements of the I.A.D. And, as the District Judge recognized, the stringent enforcement sanction of Article V(c) ("dismissal of the indictment with prejudice") requires no showing of prejudice.

When 46 states, the District of Columbia, and the United States Government, acting through Congress and the President, entered into the I.A.D., each of the 48 participants yielded some small measure of its sovereignty. The Agreement was written with meticulous care. It even anticipated the possibility that its terms might have harsh effects if employed by state officials who were ignorant of its terms. The Agreement specifically provided:

> Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.
>
> Art. VII.

The Agreement also provided in Article IX, "This agreement shall be liberally construed so as to effectuate its purposes."

Over and above the conclusions expressed in this opinion,

[Slip Opinion, p. 20]

any doubts this court might entertain concerning whether or not Congress' approval of the Interstate Agreement on Detainers rendered that agreement federal law for purposes of federal habeas corpus proceedings have been removed by the Supreme Court's opinion in *United States* v. *Mauro,* 98 S.Ct. 1834 (1978). Dealing specifically with the 120 day limitation, Justice White's opinion for the Court there said:

> We do not accept the Government's narrow reading of this provision; rather we view Art. IV(c) as requiring commencement of trial within 120 days whenever the receiving State initiates the disposition of charges underlying a detainer it has previously lodged against a state prisoner. Any other reading of this section would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action.

> Finally, we agree with the Court of Appeals in No. 77-52 that respondent Ford's failure to invoke the Agreement in specific terms in his speedy trial motions before the District Court did not result in a waiver of his claim that the Government violated Art. IV(c). The record shows that from the time he was arrested Ford persistently requested that he be given a speedy trial. After his trial date he had been continued for the third time, he sought the dismissal of his indictment on the ground that the delay in bringing him to trial while the detainer remained lodged against him was causing him to be denied certain privileges at the state prison. We deem these actions on Ford's part sufficient to put the Government and the District Court on notice of the substance of his claim.
>
> The United States does not challenge the conclusion of the Court of Appeals that, if Art. IV(c) was applicable, it was violated by the extensive delay in bringing Ford to trial. Accordingly, we conclude that the Court of Appeals correctly reversed the judgment [Slip Opinion, p. 21] of the District Court and ordered that the indictment against Ford be dismissed.
>
> The judgment of the Court of Appeals in No. 76-1596 is reversed, and the case is remanded for further proceedings consistent with this opinion. In No. 77-52, the judgment of the Court of Appeals is affirmed.
>
> *United States* v. *Mauro, supra* at 1849 (footnotes omitted).

For the reasons previously cited and on the authority of *United States* v. *Mauro, supra,* as just quoted above, the judgment of the District Court is vacated and the case is remanded for entry of the appropriate writ of habeas corpus.